IN THE SENATE OF THE UNITED STATES.

IN THE SENATE OF THE UNITED STATES, *March* 17, 1864.

Resolved, That three thousand copies of Report (Rept. No. 25) on bill S. 99, "To secure equality before the law in the courts of the United States," be printed for the use of the Senate.

Mr. SUMNER made the following

REPORT:

[To accompany bill S. No. 99.]

The Committee on Slavery and the Treatment of Freedmen, to whom was referred Senate bill (No. 99) entitled "A bill to secure equality before the law in the courts of the United States," have had the same under consideration, and ask leave to report:

Before making a change in our laws, it is important to consider the nature and extent of what is proposed; especially is this the case, if the change in question will be far-reaching in its influence. Therefore, the committee have thought best, in proposing to prohibit all exclusion of colored testimony in the courts of the United States, to exhibit with some degree of minuteness the considerations bearing on the subject.

EXCLUSION OF COLORED TESTIMONY RECOGNIZED BY CONGRESS.

Of course, Congress has never in formal words declared that witnesses in the courts of the United States shall be incompetent to testify on account of color. The abuse has arisen indirectly. But it is none the less fastened upon the national jurisprudence. By act of July 16, 1862, (Statutes at Large, vol. 12, p. 588,) it was provided that "the laws of the State in which the court shall be held shall be the rule of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity, and in admiralty." But this rule, thus authoritatively declared, had been practically recognized by the courts of the United States from the beginning of the government. It appears from the judiciary act of 1789, (1 Statutes at Large, 92,) under which the national courts were organized, that jurors in these courts "shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens," (sec. 29;) and still further, "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." (§ 34.) Under these injunctions it was very easy, if not natural, for the courts of the United States to adopt the law of evidence in the States where they were respectively held; and thus the incapacity of colored testimony, in those States where it prevailed, became a rule of evidence in the national tribunals.

It is plain that such a system made the administration of justice differ in different States. The same statute might be successfully administered in a State

where there was no exclusion of colored testimony, and miserably fail in another State where such testimony was excluded. And the same judge might be called in one court to admit the testimony, and in another court to reject it. But the least objection to this system is its want of uniformity. In lending the sanction of the United States, even indirectly, to an exclusion founded on color, all the people have been made parties to an injustice.

But in order to appreciate the true character of this proscription, it is necessary to repair to the slave States, where it is declared, and to consider it in the very language, legislative and judicial, by which it has been maintained, not neglecting the eccentricities of judicial opinion by which it has been illustrated. From the statement of the rule, its consequences will become apparent. It may be proper, afterwards, to glance at the associate examples of history, and also to endeavor to comprehend the reasons on which the proscription has been vindicated.

EXCLUSION OF COLORED TESTIMONY IN THE SLAVE STATES.

The committee begin with the statutes of the States where this proscription prevails. Each State will be considered by itself.

(1.) In Delaware the rule assumes its mildest form, yet even there it is indefensible. It has been expressed by Chief Justice Bayard, who, in an opinion of the court, said: "On the introduction of negro slavery into this country, it became a settled rule of law that slaves should not be suffered to give evidence in any matter, civil or criminal, affecting the rights of a white man."—(3 Harring. Rep., 549.) In this spirit the revised code of Delaware has provided (art. 921, cap. 52, § 12.) that "to give evidence against any white person" is one of the "rights of freemen." But the rule is thus applied: "In criminal prosecutions a free negro or mulatto, if otherwise competent, may testify, if it shall appear to the court that no competent white witness was present at the time the fact charged is alleged to have been committed, or that a white witness being so present has since died, or is absent from the State, and cannot be produced; *provided* that no free negro, or free mulatto, shall be admitted as a witness to charge a white man with being the father of a base-born child."—(*Ib.*, cap. 107, § 41.) With this exception, the free negro or mulatto is disqualified as a witness against a white person.—(*Ib.*, cap. 52, § 12.) But colored testimony is admissible in a case between colored persons, or against a colored person where the other party is a white man.—(3 Harring., 316.)

But the subtleties in the application of this rule appear in a decided case, where one of three accomplices was indicted for kidnapping a colored boy. The latter was opposed as a witness, on the ground that there were two competent white persons present who might be produced. But the court, considering that the statute was originally enacted to remedy an injustice to free persons of color, construed it liberally, and admitted the testimony of the colored boy on the ground that the commission of an offence by two or more persons ought not to render a witness incompetent who would be competent if the offence had been committed by only one person. It was further said that the statute, when it speaks of a competent white witness, means not merely his competency in the common sense of the term, but the sufficiency of his evidence under ordinary circumstances to produce conviction; although it was declared to be the practice to direct a jury to acquit the prisoner unless part of the accomplice's testimony was confirmed by unimpeachable testimony.—(State *vs.* Whitaker, 3 Harring., 549.) In another case, where two white witnesses, not accomplices, were present at an assault, the court at first excluded the testimony of the colored person; but when it afterwards appeared that one of them was drunk, and the other did not see the whole transaction, although both knew that a blow was struck, the testimony of the colored person was admitted.—(State *vs.* Cooper, *Ib.*, 571.)

Still further, it has been declared in Delaware that on an indictment of a white man for kidnapping a free colored person, the latter is not competent to prove his freedom.—(1 Harring., 570.) So, also, in an action against a stage-coach proprietor for aiding in the escape of a slave, the admissions of the latter that he is slave of the plaintiff cannot be received.—(*Ib.*, 217.) But a free colored person may make oath to his book of original entries, and thus make it evidence even against a white person, on the declared ground that "it would be idle for the law to recognize in persons of color the right to hold property and to obtain redress in law and equity for injuries to person or property if the means of redress be denied them."—(*Ib.*, 439.)

Prior to the statute, which was originally passed in 1799, where a white person committed an assault on a colored woman, and there was no third person present, the latter was held as a witness. (3 Harring., 572, note;) but in a case where several white persons were present, the colored person was held incompetent.

(2.) In Maryland, the act of 1717, cap. 13, § 2, provides that "no negro or mulatto slave, free negro, or mulatto, born of a white woman during his time of servitude by law, or any Indian slave or free Indian natives of this or the neighboring province, shall be admitted and received as good and valid evidence in law, any matter or thing whatever depending before any court of record, or before any magistrate within this province, wherein any Christian white person is concerned." Yet, nevertheless, according to this same act, (§ 3,) where other sufficient evidence is wanting against any negro, in such case the testimony of any negro may be heard and received in evidence, according to the discretion of the several courts of record, or magistrate before whom such a matter or thing against such negro shall depend, provided such testimony do not extend to the depriving them, or any of them, of life or member.

The same system is pursued in the later act of 1796, cap. 67, § 55, which provides that manumitted slaves shall not be allowed "to give evidence against any white person," nor be received "as competent evidence to manumit any slave petitioning for freedom." But by act of 1808, cap. 81, § 1, it is provided, that in all criminal prosecutions against any negro or mulatto, slave or free, the testimony of any negro or mulatto, slave or free, "may be received in evidence for or against them, any law now existing to the contrary notwithstanding."

The original act of 1797 does not in terms extend to free mulattoes, and the act of 1796 does not extend to the issue of manumitted slaves. But, where "a free-born white Christian man" was convicted of felony on the testimony of a mulatto, born of a manumitted negro, there was among the judges in the court of appeal such a diversity of opinion on the legality of the testimony that no decision was ever given.—(*State vs.* Fisher, 1 Howard & John., 750.) In another case it was decided that where both parties are "free white Christian persons," a free colored person is incompetent. (3 Howard & John., 97.) although a mulatto descended in the female line from a white woman is incompetent.—(*Ib.*, 491.)

(3.) In Virginia, the revised code (cap. 177, § 19) declares positively that "a negro or Indian shall be a competent witness in a case of the commonwealth for or against a negro or Indian, or in a civil case to which only negroes or Indians are parties, *but not in any other case.*" The decisions of the courts here illustrated this proscription. Thus, it has been adjudged in one case that a free colored person cannot testify for a white person even against a colored person.—(6 Leigh, 74.) But, in another case, it was admitted that a colored convict might testify against a white one with regard to an offence committed in the penitentiary; but this was placed on the ground that convicts generally may be witnesses against each other.—(2 Gratt., 581.) This decision, however, was superseded by another provision of the code, (215, § 9,) which declares that, on the prosecution of a convict, "all other convicts in the penitentiary shall be competent witnesses for or against the accused, *except that negroes shall*

not be allowed as witnesses against a white person." They may, however, still testify in his favor.

(4.) In Kentucky the revised statutes (cap. 107, § 1) provide that "a slave, negro, or Indian, shall be a competent witness in a case of the commonwealth for or against a slave, negro, or Indian, or in a civil case to which only negroes or Indians are parties, *but in no other case.* This shall not be construed to exclude an Indian in other cases, who speaks the English language and understands the nature and obligation of an oath."—(See 7 Monroe, 88.) Under this provision, as under that of Virginia, it has been decided that a free colored person cannot be a witness for a white person against a colored person.—(8 Monroe, 192.)

(5.) In North Carolina the revised statutes (cap. 111, § 50; cap. 31, § 8; act 1777, cap. 115, § 42; act 1821, cap. 123) provide that "all negroes, Indians, mulattoes, and all persons of mixed blood descended from negro and Indian ancestors, to the fourth generation inclusive, (though one ancestor of each generation may have been a white person,) whether bond or free, shall be deemed and taken to be *incapable in law to be witnesses in any case whatsoever,* except against each other."—(See 1 Hawks, 434.) Under this statute they cannot testify for each other in a criminal case. But the decisions furnish again curious illustrations. Thus, when a colored person was convicted on colored testimony, as a principal felon, it was subsequently held on the trial of the accessory, who was white, that the record of the conviction was only *prima facie* evidence of guilt.—(2 Dev., 491.) In another case it was held that a free colored woman could not make an affidavit charging a white man as the father of her illegitimate child, (5 Ind. Law Rep., 155.) although the contrary has been decided in Kentucky, on the assumption that the act is merely preliminary to the real controversy.—(5 Lit., 171.)

(6.) In Tennessee the act of 1794, cap. 1, sec. 32, provides that "all negroes, Indians, mulattoes, and all persons of mixed blood descended from negro or Indian ancestors, to the third generation inclusive, (though one ancestor of each generation may have been a white person,) whether bond or free, shall be taken and deemed to be incapable in law to be a witness in any case whatever, *except against each other:* Provided, also, that no person of mixed blood in any degree whatever, who has been liberated within twelve months previously, shall be admitted as a witness against a white person." Under this act, which was evidently borrowed from the earlier statute of North Carolina, it was decided that a colored person could not be a witness *for* another colored person. (1 Meigs, 121.) The judge who gave the opinion of the court on this occasion seems to confess the harshness of the rule, when he says: "The cases under this act in which these disqualified persons can be witnesses for each other are when, plaintiff and defendant both being men of color, the witnesses may at the same time be said to be, reciprocally, witnesses against each of the parties. Perhaps the practice in Tennessee may have been heretofore more liberal than the statute. With that we have nothing to do. As the law speaks, so it is our duty to speak." To remedy this gross injustice, the act of 1839, cap. 7, § 1, (supplement, p. 131,) was passed, by which it was provided that such parties, "whether bond or free, shall be taken and deemed to be good witnesses for each other in all cases where, by the provisions of said act, (viz., act of 1794,) they are made competent witnesses against each other in criminal prosecutions."

(7.) In South Carolina there appears to have been no statute expressly excluding the testimony of a slave against a white person, although the early act of 1740, cap. 39, (7 Cooper, 44,) necessarily implies this exclusion. But the rule was autochthonous. It sprang from the soil without statute. Judge O'Neale, in a decision of the court, declares that "a slave cannot testify except against another slave, free negro, mulatto, or mestizo, and that without oath."—(2 De Bow, 279.) But the exclusion did not bear merely upon slaves. The

judge announces that "free negroes, mulattoes, and mestizoes cannot be witnesses in the superior courts, or even in the inferior courts, with the single exception of a magistrate's freeholder's court, trying slaves or free negroes, mulattoes, or mestizoes, and then without oath."—(*Ib.*, 274.) It appears that the act of 1740, § 1344, (7 Cooper, 401, 402,) on which this custom was founded, applies only to "free Indians and slaves," so that strictly free negroes, mulattoes, and mestizoes are not despoiled of their right at common law to be heard under oath, but the uniform practice under the act, according to the judge, has been otherwise.—(*Ib.*, 274.) On another occasion, still another judge of South Carolina says: "There is no instance in which a negro has been permitted to give evidence, except in case of absolute necessity; nor, indeed, has this court ever recognized the propriety of admitting them in any case where the rights of white persons are concerned."—(1 McCord, 430.) In still another case it was decided that a free person of color was not a competent witness in any case in a court of record, although both parties to the suit are of the same class with himself.—(Gleding *vs.* Berana, (2 Bailey, 192.)

This rule, thus rigorously declared, has given rise to some strange illustrations. Thus, for instance, in a suit to recover certain slaves as part of a gang named, evidence was admitted that other negroes of the defendant were accustomed to speak of those in question as belonging to the gang.—(Riley, Chan., 53.) In another case, where the book of a tradesman was made up from the entries of a negro workman on a slate, and a notice was affixed to the door of the shop that all credits there should be charged according to the negro's entries, the court doubted whether the book could be evidence at all; but if at all, it could be evidence only of the amount of the work done, and then only against a person who was otherwise proved to be a customer.—(Gage *vs.* McIwair, 1 Strob., 135.)

(8.) In Georgia, as in South Carolina, there is no statute which expressly excludes the testimony of a slave where white persons are parties. But they are excluded. The act of 1770, which declares slaves to be chattels personal to all intents and purposes whatsoever, provides further, (§ 10; 2 Cobb's Dig., 973,) "that the evidence of any free Indians, mulattoes, mestizoes, or negroes, or slaves, shall be allowed and admitted in all cases whatsoever for or against another slave, accused of any crime or offence whatsoever, the weight of which evidence, being seriously considered and compared with all other circumstances attending the case, shall be left to the justices and jury." But where white persons are parties, the rule of exclusion seems here to be implied. And the same exclusion seems also to be implied in the later act of December 19, 1816, § 5, (2 Cobb, 988,) where the rule that "any witness shall be sworn who believes in God and a future state of rewards and punishments," is restrained to "the trial of a slave or free person of color."

(9.) In Alabama the exclusion stands on positive statute. The code (§ 2276; see also § 3596) provides that "negroes, mulattoes, Indians, and all persons of mixed blood, descended from negro or Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person, whether bond or free, must not be witnesses in any cause, civil or criminal, except for or against each other."

(10.) In Mississippi the act of June 18, 1822, (§ 110, 1111; Hutch. Code, 861,) is nearly the same in language with the code of Alabama on this subject. But by act of January 19, 1830, (Code, 136,) free Indians are placed on the same footing as white persons, and consequently can testify.—(3 S. & M., 575, 576; 4 *Ib.*, 40.)

(11.) In Florida, the law is brief and explicit. The act of November 21, 1825, section 16, (Thompson's Digest, 542,) provides that "any negro or mulatto, bond or free, shall be a good witness in the pleas of the State for or

against negroes or mulattoes, bond or free, or in civil cases where free negroes or mulattoes shall alone be parties, and in no other cases whatever."

(12.) In Missouri, the revised statutes (cap. 187, § 22) provide that "no negro or mulatto, bond or free, shall be a competent witness, except in pleas of the State against a negro or mulatto, bond or free, or in civil cases, in which negroes or mulattoes alone are parties." But it has been decided that if a free negro is the party to the record, even though he vouches in a white person to defend his title, colored testimony is admissible.—(4 Missouri, 361.)

(13.) In Arkansas, the revised statutes (cap. 158, § 25) provide that "no negro or mulatto, bond or free, shall be a competent witness in any case, except in cases in which all the parties are negroes or mulattoes, or in which the State is plaintiff, and a negro or mulatto, or negroes or mulattoes, are defendants."

(14.) In Louisiana, the revised statutes (p. 556; act of 1816, cap. 146, § 7) provide that "no slave shall be admitted as a witness, either in civil or criminal matter, for or against a white person;" and also, (*Ib.*, § 2,) "no slave shall be admitted as a witness, either in civil or criminal matters, for or against a free person of color, except in case such free individual be charged with having raised, or attempted to raise, an insurrection among the slaves of his State, or adhering to them by giving them aid or comfort, in any manner whatsoever."

The civil code (art. 1584) declares "absolutely incapable of being witnesses to testaments," "women of what age soever," and "slaves." But the civil code (art. 2261; see also *ib.*, art. 177) has provided expressly that "the circumstance of the witness being a free colored person is not a sufficient cause to consider the witness incompetent, but may, according to circumstances, diminish the extent of his credibility;" so that a free colored person in Louisiana may be a witness for or against a white person, subject to inquiry as to the value of his testimony.

(15.) In Texas, the act of May 13, 1846, (Hart. Dig., art. 2586,) provides that "all negroes and Indians, and all persons of mixed blood descended from negro ancestry, to the third generation inclusive, though one ancestor of each generation may have been a white person, shall be incapable of being a witness in any case whatsoever, except for or against each other."

SUMMARY STATEMENT OF THE RULE.

From this review of the provisions in the different States it appears that, with slight differences, there is nevertheless a prevailing resemblance, such as becomes the sisterhood of slavery;

> —— facies non omnibus una
> Nec diversa tamen: qualem decet esse sororum.

If the recital has seemed weary, it has not been superfluous, for it has disclosed the disgusting terms of that proscription. It is difficult to read the provisions in a single State without impatience: but the recurrence of this injustice, expressed with such particularity in no less than fifteen States, makes impatience swell into indignation, especially when it is considered that, in every State, this injustice is adopted and enforced by the courts of the United States.

Slaves cannot testify in any of the States for or against a white person, in any case, either civil or criminal; unless, perhaps, in Maryland they may be allowed to testify against a "white person who is not a Christian."

Free persons of color are also, like slaves, incompetent to testify for or against white persons, except in Delaware and Louisiana, where, under circumstances already stated, they may testify, even though a white person is a party.

It may be observed also that the statutes of Delaware, Florida, Missouri and Arkansas do not expressly include Indian slaves; but there are, probably, only a few slaves of pure Indian blood. Those of mixed Indian descent would undoubtedly be classed with mulattoes, and share their incapacity.

ECCENTRICITIES OF JUDICIAL DECISIONS ILLUSTRATING THIS EXCLUSION.

But this rule may be seen also in judicial decisions, which may be classed among the eccentricities of jurisprudence. Subtlety is a common attribute of courts, but in these cases subtlety at times becomes fantastic. Reading them, we may well confess that truth is stranger than fiction.

Thus, although slaves are not permitted to testify, their conversation or declarations may, under certain circumstances, be admitted in evidence. For instance, according to a decision in Missouri, if a white person converses with a slave, the conversation, if otherwise admissible, may be proved by any other white person who heard it. In this case, Judge Scott said: "That negroes cannot testify against white persons is clear; but this rule cannot be carried so far as to exclude the conversation of a negro with a white person, when the conversation on the part of the negro is merely given in evidence as an inducement and in illustration of what was said by the white person. If the conversation of the negro had been proved by herself, then it would clearly have been illegal. Hence the State proved by competent witnesses that certain remarks were made by the plaintiff, in order to show what her reply was. It is a matter of indifference by whom they were made. All that was required was to prove by competent evidence that they were made. That they were made is a fact, which may be proved like any other fact in the cause."—(Hawkins *vs.* The State, 7 Missouri, 192.)

On the same principle, it has been decided that any remarks made by a slave to a white person, calling for some reply on the part of the latter, may be proved by the testimony of white persons, in order to show the nature of that reply, or that none was made. The question arose on an indictment for enticing away a slave, when Judge Goldthwaite said: "The question which the court is called upon to determine is simply whether the admission of a white man to the truth of any statement made by a slave, in his presence and hearing, can be inferred from his silence. The rule in relation to evidence of this character, so far as we are able to deduce it from adjudged cases and the best elementary writers, is, that the statement must be heard and understood by the party affected by it; that the truth of the facts embraced in it must be within his knowledge, and that the statement must be made under such circumstances and by such persons as actually to call for a reply. To reject the evidence in the case under consideration, solely on the ground that the party making the declaration was a slave, would be in effect to decide that under no conceivable circumstances could a statement made by a slave call for response from a white man; a proposition in direct opposition to our daily observation and experience. That the declaration was made by a person whose condition rendered him incompetent as a witness does not in the slightest degree affect the principle on which evidence of this character rests. If the declaration was made by a slave, and the party affected by it had made by his reply a direct admission of its truth, there could be no doubt of the admissibility of the statement and reply; and in case of implied admission, the admission, instead of being made by language, is made by the silence of the party."—(Spencer *vs.* The State, 20 Alabama, 24.)

But there seems to be no end to the illustrations of this exclusion; as, for instance, when a colored woman acted as interpreter between a testator who draughted the will. In this case Judge Lumpkin said: "We hold that where a negro interpreter, incapable by law of being sworn, is the *only* channel of communication between the testator and the writer of the will, and there be no other evidence of the testator's knowledge of its contents, or his assent thereto, than that which is derived through this medium, the will cannot be executed. But if the will be written in the presence of the testator, and, in a language which he understands, it is read over to him, and his dictation and approval of the instrument

are interpreted by a negro in his hearing, and in the hearing of others interested in its contents, and he signifies no dissent thereto, by signs or otherwise, but, on the contrary, is understood to express himself satisfied, the will may be established, especially if it appear to have been made in conformity to the previously declared intimation of the testator, as to the disposition of his property."—(Potts *vs.* Howe, 6 Geo., 348.)

And it has been decided that the incapacity of a free colored person will not prevent him, even in a proceeding against a white person, from making an affidavit required to obtain a continuance, a new trial, absent testimony, or bail, or from swearing to a plea of *non est factum*. He may also bind a white person to keep the peace, or make affidavit for a writ of *habeas corpus*, and generally he may make such affidavits as may be necessary to commence a suit, or to procure such orders or steps to be taken therein, as may be required to bring on a trial.—(7 Leigh, 435; 1 Dana, 467; 5 Litt., 171; 2 De Bow, 274.) Without this capacity he would, according to Chief Justice Robertson, of Kentucky, "be virtually disfranchised." But the Chief Justice adds, that when he is swearing to facts against a white man, to compel him to keep the peace, "he is not a *witness*, but a party swearing to what any other party may."—(Cann *vs.* Oldham, 1 Dana, 466.) And thus his incapacity as a witness is still recognized.

In another class of cases, where it became necessary to show the mental condition or bodily health of the slave, his declarations have been held to be admissible even in a suit against a white person; but they must be proved by white testimony. Thus, in an action for breach of covenant in not teaching a slave, bound as an apprentice to the business of coach-making, the defendant offered to prove that when he wished to instruct the slave in his business, and threatened to punish him if he did not apply himself, the latter, as soon as the defendant was out of the way, would declare "that he did [not] care about learning the trade; it was no profit to him, and if he could avoid the lash it was all he cared for;" it was held by that prominent magistrate, Chief Justice Gaston, of North Carolina, that "the declarations of the slave are admissible, because his disposition and temper are subjects of investigation, and these cannot be ascertained except through the medium of such external signs."—(Clancy *vs.* Orwman, 1 Rev. and Batt., 402.) In another case the same question occurred under these circumstances: A slave had been hired by his master to work in certain gold mines; but, while busy at the bottom of a shaft one hundred and eighty feet deep, he was struck on the head by an iron drill, weighing five pounds, which fell from the top, and his skull was fractured so that trepanning became necessary, and "a large piece of the skull-bone was cut out." In an action by the master for damages on account of the injury to his slave, Judge Pearson commented on this rule of evidence as follows: "It being material to ascertain the bodily condition of the slave, his complaints of headache when exposed to the sun, and his declaration that he was unable to work in the sun, or to endure hard labor, are admissible The statute excluding the testimony of a slave or free person of color against a white man has no application. The distinction between natural evidence and personal evidence, or the testimony of witnesses, is clear and palpable. The actions, looks, and barking of a dog are admissible as natural evidence, upon a question as to his madness. So the squeaking and grunts, or other expression of pain, made by a hog, are admissible upon the question as to the extent of an injury inflicted on him. This can in no sense be called the testimony of the dog or the hog. The only advantage of this natural evidence, when furnished by brutes, over the same kind of evidence when furnished by reasonable beings, whether white or black, is that the latter, having intelligence, may possibly have a motive for dissimulation, whereas brutes have not; but the character of the evidence is the same, and the jury must pass upon its credit."—(Biles *vs.* Holmes, 11 Iredell's Law Rep., 16.)

The same principle has been recognized in still another case, where the slave

died of mortification of the bowels, and no physician was called in until the day before his death, although his illness had continued for three weeks. On this occasion Judge Green said: "The statement of a sick slave as to the seat of his pain, the nature, symptoms and effects of his malady, is as well calculated to illustrate the character of his disease as would be the statement of any other person. They are, therefore, equally admissible for that purpose. But whether expressions indicating the nature and effects of a disease, uttered by the sick person, are real or feigned, is for the jury to determine."—(Yeatman *vs.* Hart, 6 Humph., 375; see also 10 Miss., 320; Dudley, S. C. Rep., 328; Georgia Decisions, part 1, p. 79.) And this principle has also been recognized in suits for breach of covenant in the warranty of a slave, or for fraud in the sale of a slave.—(9 Iredell Law Rep., 63; 1 Humph., 265.) But if the master distinctly warrants the slave sound, he will not be allowed to relieve himself of liability for this false warranty by declarations of the slave to the purchaser that he is diseased. A curious case occurred in Kentucky which illustrates this principle, and also the brutality of slavery. It appears that a poor slave woman was very ill when her master formed "the intention of selling her, lest he should lose her value by death." Notwithstanding her pitiable condition, he succeeded in disposing of her for two hundred dollars, one-quarter in a note and the remainder in saddletrees, on the representation that she was "hearty and sound and fit for business." The court annulled the sale, and directed the price of the saddletrees to be given up, although the slave woman, before the sale, told the purchaser of her sickness. In its opinion the court said: "The slave herself told the purchaser of her sickness before the sale; and after the sale, when informed by him that he had bought her, she stated that she could not be of any use to him, as she was near death. When it is recollected that frequently on such occasions there is a strong indisposition in such creatures to be sold; that, by stratagem to avoid a sale, they very frequently feign sickness, or magnify any particular complaint with which they are affected, the purchaser might well disbelieve her story, especially when the words of the master assured him to the contrary. For his own statements the master is responsible, and he ought not to be permitted to release himself from responsibility for his own falsehood by showing that the slave at the time so far corrected him as to tell the truth."—(Brownton *vs.* Cropper, 1 Litt., 175.)

The principle which underlies the admission of the declarations of a slave is plainly but brutally expressed by Judge Pearson, of North Carolina.—(Biles *vs.* Holmes, 11 Ired. Law Rep., 16; see also 10 Miss. R., 643.) According to this learned judge, who was for the time the voice of the law, the declarations of the slave are not to be regarded as his *testimony*, any more than the barking of a dog or the grunting of a hog "can be called the testimony of the dog or the hog." The slave complains of his sickness in words, the dog moans, the hog squeals; but the law regards these expressions of suffering alike. They may be proved as facts by competent evidence, but the slave himself cannot testify what his complaints were any more than the dog or the hog!

Such are some of the eccentricities of judicial opinion on this important question. They are not to be regarded merely as curiosities, for they are all adopted and enforced in the courts of the United States, so that even the most brutal language becomes not merely the voice of the law, but the voice of the nation also.

CONSEQUENCES OF THIS EXCLUSION.

Thus do the decisions of courts, as well as the statutes, conspire to exhibit this rule in revolting features. But if we glance for one moment at its consequences there will be new occasion to condemn it.

Looking at it in a single aspect, there are consequences which baffle the imagination to picture. Throughout the States where this exclusion prevails, any white person may torture and maltreat a slave in any conceivable manner and

to any extent, or he may overwork and starve him, or he may whip him to death, murder him in cold blood, or burn him alive; and so long as he is the only white person present, the laws afford him the most complete immunity from punishment, except in Delaware and Louisiana, where also he is safe if only slaves are present. It is true that the same laws profess to punish the murder of a slave as a capital offence, and also to punish severely any mutilation or other cruel treatment of him. But such laws are nothing more than "words, words, words." So long as the slave himself is not allowed to testify to his wrongs, so long the laws will be justly obnoxious to the charge of actually authorizing a white person to inflict any outrage upon a slave, even to the extent of taking his life with impunity. Every white person, with only slaves about him, or it may be with only colored persons, slave or free, has a *letter of license* to commit any outrage which passion or wickedness may prompt.

The exposed condition of slaves, on account of their incapacity to testify, was formerly recognized in the early legislation of South Carolina. The preamble to the act of 1740 (§ 39, 7 Coop., 44) begins as follows: "Whereas, by reason of the extent and distance of plantations in this province, the inhabitants are far removed from each other, and *many cruelties may be committed on slaves, because no white person may be present to give evidence of the same.*" Thus even out of the mouth of South Carolina, before this State had learned to sacrifice everything to slavery, we learn that "many cruelties may be committed on slaves" under the operation of this rule But no such confession was needed. The truth is apparent to the most superficial observer. Had South Carolina, at that early day, followed the suggestion of her own statute, she would have begun a career of civilization under which slavery itself must have disappeared.

But the exposed condition of slaves on this account is curiously attested by other statutes of the slave States, showing that plantations far removed from the cities, and at considerable distance from each other, are committed to the direction of a *single white overseer*, who, from the circumstance that he is the only white person present, is placed beyond all restraint or correction. Thus, in South Carolina, (act 1740, § 46, Cooper, 413; act 1800, § 5, *ib.*, 412; 2 McCord R., 310, 363, 473;) in Florida, (act 1846, cap. 87, § 12; Thomp. Dig., 176; act Nov. 21, 1825, § 43, *ib.*, 511;) in Georgia, (act Dec. 20, 1823, § 2; 2 Cobb Dig., 996; act May 10, 1770, § 43, *ib.*, p. 981;) and in Louisiana, (Rev. Stat., p. 525, act of 1814, cap. 32, § 1–3,) the statutes exact the continued residence of *one white person* on every plantation, with a specified number of working slaves. These statutes had their origin in no sentiment of justice or humanity, but, as appears in early declarations, to prevent the harboring of fugitive slaves, who might find an asylum among those exclusively of their own color. If, however, it was thought necessary for any purpose to require by penalties the continued residence of *even one white person* on a slave plantation, it is reasonable to infer that there must be many plantations where there is only one white person. And to one white person thus situated, and thus removed from all check or observation, the law commits the government and guardianship of slaves on a plantation, and promises him in advance the most complete impunity for all that he does, even to the extent of cold-blooded murder, provided only that he is careful to let no white person see the deed.

But this proscription is not confined to slaves. Free colored persons, under the operation of this rule, are exposed to the same fearful wrongs. A white person may treat them as he treats a slave, and they are absolutely without remedy. It would be difficult to point out any law, the spawn of cruelty or tyranny in ancient or modern times, exceeding in atrocity that by which a free population is thus despoiled of protection on account of color. It was one of the boasts of Magna Charta that justice should be denied to no person, *nullo negabimus justitiam*. But under this rule it is denied to a whole race.

Of course the race, whether bond or free, which is thus despoiled, suffers. But this is not all. Justice itself suffers also. Even crime against white persons in the presence of colored persons must go unpunished.

And yet this proscription is adopted and enforced in the courts of the United States.

But there are other aspects of this subject which invite attention. History has her lessons. Reason also speaks with a voice that must be heard. It becomes important, therefore, to consider this proscription, first, in its origin and in the examples of history; and secondly, in the grounds on which it is founded.

EXAMPLES OF HISTORY.

This proscription, or its equivalent, may be traced to the earliest days. It belongs to the Barbarism of Slavery. Even when applied to free colored persons, it must be considered as a relic of slavery not yet removed out of sight.

The rule may also be treated as belonging to that system of evidence which, in defiance of reason, undertook to declare, in advance, that certain classes of witnesses were incompetent to testify, or, in other words, that the court and jury should not be permitted to hear what they had to say on the matter in issue. In the early common law many persons were excluded who are now admitted to testify; and the committee cannot err when they declare that the plain tendency of recent legislation, and also of judicial decisions in England and in the United States, has been to limit objections to the capacity of witnesses, and to allow the court and jury on hearing their testimony to estimate its weight and value. This whole system of exclusion was covered with ridicule by Jeremy Bentham, who has exposed its irrational character. In our own country it has been treated in a similar spirit, in a series of masterly essays on the law of evidence by the present learned Chief Justice of Maine, honorable John Appleton.* In its origin it may be traced to ignorance and prejudice. There was a time when in Great Britain, at least on the borders of England and Scotland, an Englishman could not be a witness against a Scot, nor a Scot against an Englishman, "by reason of the enmity between the two nations; so that if so many Englishmen should, with their open eyes, see a Scot commit murder, their testimony would signify nothing unless some Scot testified the same thing."—(Puffendorf's Law of Nature, Book V, ch. 13, §. 9.) But their exclusion in this historic case was identical in principle and consequence with that which still has the sanction of Congress.

This whole body of cases has been despatched by Jeremy Bentham in these words: "Exclusion put upon all persons of this or that particular description *includes a license to commit*, in the presence of any number of persons of that description, *all imaginable crimes*."—(Bentham's Works, vol. 7, p. 339.) The Psalmist exclaims, "I said in my wrath all men are liars." But the malediction of the Psalmist in his wrath is gravely adopted in this proscription, which undertakes to blast "all men" of a specified description "as liars." Assuming that all of a certain class, or race, or color cannot be believed on oath, it practically says, that though present *in point of fact* at any crime, they are to be considered as absent *in point of law*.

By the Mahommedan law no person could be convicted of adultery without the testimony of *four eye-witnesses*—a requirement which was called by Gibbon in his history "a law of domestic peace."—(Vol. IX, p. 396.) The extravagance of this requirement rendered it practically a law to prevent conviction, not unlike in its operation the law excluding testimony. It is a disguised exclusion. But of the two the Mahommedan law is the least irrational. At all events, it does not assume the form of proscription.

*A recent letter from this distinguished authority on the exclusion of colored testimony will be found annexed to the present report.

But the rule of exclusion, when founded on race or color, is something more than a rule of evidence, from which justice may suffer. It is a proscription which finds its prototypes in other countries and times, kindred in character to the persecution of the Moors in Spain, and to that cruelty which for ages pursued the Jews everywhere, while it reveals that insensibility to the claims of a common humanity, which has so slowly yielded to the demands of a just civilization. In France during the last century, even after politeness had begun to prevail, it is recorded of a most intellectual lady, the commentator upon Newton, Madame du Chatelet, that she did not hesitate to undress before her male domestics, as it did not seem clear that such persons were men.—(Tocqueville, Ancien Regime, p. 280, cap. 17.) But it is in the irreligious system of Caste, as established in India, that we may find the most perfect parallel. Indeed, the late Alexander von Humboldt, in speaking of colored persons, has designated them as a Caste, and a political and juridical writer of France has used the same term to denote, not only the distinctions in India, but those in our own country, which he characterizes as "humiliating and brutal."—(Charles Comte, *Traité de Législation*, tom. 4, pp. 129, 445.) But the Caste of India by which the Brahmins and Sudras have been kept apart, is already repudiated by Christian civilization as "part and parcel of idolatry." Bishop Heber, of Calcutta, says of this injustice: "It is a system which tends, more than any else the devil has yet invented, to destroy the feelings of general benevolence, and to make nine-tenths of mankind the hopeless slaves of the remainder."—(Roberts on Caste, p. 134.) But the language with which this accomplished bishop condemns the heathen Caste of India, is not inapplicable to that other Caste in our own country, which, in one of its incidents, despoils the colored person of his right to testify.

If we go back to the ancient Greeks, we shall find an interesting distinction on this subject. A slave was not believed on his oath. So that one is recorded as exclaiming, in words which might be adopted in our day, "I know that I am a slave, and therefore I am ignorant of even that which I know." But though not believed on his oath, his evidence was always taken with torture. On this account his testimony appears to have been considered of more value even than that of freemen. Thus Isæus, in arguing a case, said, "when slaves and freemen are at hand, you do not make use of the testimony of freemen; but, putting slaves to the torture, you thus endeavor to find out the truth of what has been done." Any person might offer his own slave to be examined by torture, or demand the same thing of his adversary, and the refusal of the latter was regarded as a strong presumption against him.—(Smith, Dict. Greek and Rom. Antiq., Art. Servus.) Thus cruelly did this sharp people seek to counteract the senseless rule of exclusion. Torture was recognized, but justice was not absolutely sacrificed.

The Romans seem to have borrowed this practice from the Greeks, or they were inspired to a kindred cruelty. Not only slaves, but even free persons of an inferior condition, were seldom examined except under torture. But any person who wished the testimony of a slave might obtain it on giving sufficient security to the master for full reparation on account of any damage he might receive from his torture. In the later days of the empire, a general rule made the slaves inadmissible as witnesses, for or against his master, or his master's children, except in cases of treason, where the danger of the crime overruled ordinary considerations, and also in cases of incest and adultery; for the good reason that *in a society where all domestics were slaves any other evidence could hardly be procured.*—(Blair's Inquiry into Roman Slavery, pp. 62, 64.) But the latter reason might obviously exist in the case of any crime, so that, on principle, when other proofs were wanting, resort might be had to the testimony of slaves. Indeed, a learned commentator on the Roman law has distinctly said that this law did not admit slaves to be witnesses, unless the cause was

important, looking to the welfare of the republic, *or other proofs were wanting. Servos lex civilis non patitur testes esse, nisi causa sit ardua, ad reipublicæ spectans utilitatem, aut aliæ desint probationes.*—(Voet ad Pandec., lib. xxii. cap. 5, § 2; see also 1 Stephens's Slavery, 171.) It became customary, in civil matters, to admit the testimony of slaves as to their own acts, although affecting the interest of their masters; and after the establishment of Christianity, when heresy took its place as a crime to be dreaded as much as treason, the testimony of slaves was received equally with regard to each.

The rule of exclusion during the dark ages naturally took its character from the prevailing darkness. The barbarians did not, in this respect, soften the law of ancient Rome. This was a task attempted, amidst the cares of empire, by Charlemagne; but how little he accomplished may be seen in his Capitularies, where slaves are rejected as witnesses against their masters, except in cases of treason; and even *freedmen*, unless in the third generation, are not admitted to testify against freemen.—(*Capitularies*, lib. vi, cap. 157, 208.) And the same intolerance is attributed to the canon law. *Item placuit, ut omnes servi vel proprii liberti ad accusationem non admittentur.*—(*Potgiesser de Statu Servorum*, p. 612.) But it appears that at this time, among some races, it was the prerogative of royal serfs and of others, who were not of base condition, to have their testimony received against freemen, especially in cases of childbirth, violence, or death by accident.—(*Ibid.*, p. 611; Leg. Burgund., tit. vi, § 3.) And the influence of the clergy seems to have overruled this exclusion in certain specified districts. Thus, in 1109, on the petition of the ecclesiastics of Paris, King Louis VI conceded to the serfs of the latter a perfect liberty of testifying and combatting (*testificandi et bellandi*) against freemen as well as slaves; and this important concession was confirmed by the Pope, who declared, however, that there ought to be a difference in the conditions governing a family of the church and the slaves of secular persons.—(*Potgiesser*, 612.) Although this concession was made for the sake of the church rather than its humble dependants, it was an example by which the world became accustomed to receive the testimony of slaves.

But in England, under the common law, the rule of exclusion on account of slavery was never fully recognized. The *villein* seems to have been admitted as a witness in all cases except against his lord. "I do not know," says Mr. Hallam, "that his testimony, except against his lord, was ever refused in England."—(Hallam's Middle Ages, vol. i, ch. 2.) It was only in respect of his lord that he was without rights. But he was sometimes received, although the lord himself was a party, (Coke Lit., 122 *b*; Bro. Abr. Villeinage, 661; Fitzherbert, Vill. 38, 39, 4,) and in criminal cases generally it was no exception to a witness that he was a bondman.—(Hawkins's Pleas of the Crown, book 2, ch. 46, § 28.) Such, even at the beginning, was the voice of the common law. But with the disappearance of villeinage, all pretence of any exclusion on this account vanished in England, never to return.

If we follow this offensive rule, it seems to have found less acceptance in the possessions of other countries than with us. It has been inferred, after careful inquiry, that slaves in the Spanish and Portuguese settlements are not always incompetent as witnesses, while the *Code Noir* of Louis XIV, amidst ungenerous prohibitions, allowed their evidence to be heard "as a suggestion or unauthenticated information which might throw light on the evidence of the witnesses," and afterwards, by a later edict, sanctioned the testimony of slaves when white citizens were wanting, except against their masters.—(1 Stephens's Slavery, 174, 175.) But the rule is the natural complement of slavery, and it cannot be disguised that it has prevailed with corresponding degrees of force wherever slavery has been recognized. Its prevalence with us is only another illustration of the power of slavery.

If you would find the country where slaves have been most completely de-

spoiled of the right of testimony, you will not go to Greece or Rome, for in these countries the slaves were admitted to testify in certain cases; nor will you linger even in the dark ages, for there were then excepted cases; nor will you search English precedents, for the *villein* was incompetent only against his lord, and not always against him; nor will you look to the colonies of Spain, Portugal, or France, for in all of these the cruel rule was mitigated; but you will turn to those States of our republic, where the slave is not permitted to testify against his master or any other white person, and where even free colored persons, who have no master, are smitten with the same incapacity to testify against any white person.

THE GROUNDS FOR THIS INJUSTICE.

From the examples of history, the way is easy to an inquiry into the grounds on which this proscription is founded.

The true reason of this proscription may be traced to the prejudices engendered by slavery, and to the policy of sustaining this injustice. Indeed, it is hardly less essential to slavery than the lash itself. An early statute of Virginia places this rule on the ground that none but Christians should be witnesses, and even among these "Popish recusants and convicts" were inadmissible, (3 Hen. Stat., 293; act 1705, § 31.) But it is generally vindicated by dwelling on *the degraded condition of the slave, and the interest which he may have to conceal or deny the truth.*—(Wheeler's Laws of Slavery, p. 194, note.) A careful examination will show that this apology is as baseless as slavery itself.

Of course, if a witness is too degraded to feel the sanction of an oath, his testimony should not be received. Such is the unquestionable suggestion of reason; nor can it make any difference that the witness is white or black. But the slave is not necessarily and universally so degraded as to merit exclusion as a witness, nor is his interest to conceal or deny the truth different materially from that of other persons, although it is undoubtedly correct that under the instinct of self-defence against slavery he learns to deceive. But in every State except South Carolina *the oath of the slave is received against colored persons,* which could not be done if the allegation were correct that he could not be trusted under oath. A judge of South Carolina has vindicated the capacity of the slave in this respect, and thus unintentionally repelled the rule of exclusion. "Negroes, slave or free," says Judge O'Neale, "will feel the sanction of an oath with as much force as any of the ignorant classes of white people in a Christian country. They ought to be made to know that if they testify falsely they are to be punished for it by human laws. The course pursued on the trial of negroes, in the abduction and obtaining of testimony, leads to none of the certainties of truth. Falsehood is often the result, and innocence is thus often sacrificed on the shrine of prejudice."— 2 De Bow, 274.) But this learned judge of South Carolina is not alone in vindicating the propriety of examining the slave on oath. Judge Clayton, of the high court of errors and appeals in Mississippi, in delivering the opinion of the court, thus expressed himself: "It is also objected that there ought, in the case of slaves, to be some evidence of a sense of religious accountability, upon which the validity of all testimony rests, and that the same presumption of such religious belief cannot be indulged in reference to them as in regard to white persons. As to the latter, it is said, the presumption is in favor of their proper and religious culture and belief in revelation and a future state of rewards and punishments. As to slaves, it is contended the presumption does not arise because of a defect of religious education. It is true that if the declarant had no sense of future responsibility his declarations would not be admissible. But the absence of such belief must be shown. The simple elementary truths of christianity, the immortality of the soul and a future accountability, are generally received and believed by this

portion of our population. From the pulpit many, perhaps all who attain maturity, hear these doctrines announced and enforced, and embrace them as articles of faith."—(Lewis *cs.* The State, 95. & M., 118.)

But if slaves generally have a sufficient amount of religious belief to lend sanction to an oath, it is clear that they are not so degraded as to justify their exclusion as sworn witnesses. And the slave States, while excluding them, have practically recognized their fitness. Not only is the oath of a slave received in all of the slave States except South Carolina, but he is liable to punishment for perjury.— See Rev. Code Del., cap. 80, § 28; Tit. 20, cap. 130, § 1; 1 Dors. Laws Md., 92, 777; Code Va., cap. 194, § 4, cap. 200, § 5; Rev. Stat. Ky., cap. 93, art. 7, § 14–16; Rev. Stat. N. C., cap 111, § 52; Car. & Mich. Comp. Tenn., 674; Thomps. Dig. Fa., 540, § 11; 2 Cobb Dig. Ga., 974, § 19, 987, § 63; Code Ala., § 3315, 3318; Hatch. Code Miss., p. 521, § 59; and sometimes the punishment inflicted is barbarous. In Virginia, (Tabe. Dig., 335,) and also in Maryland, (1 Dors., 92, the punishment formerly was "cropping." In Florida the statute appoints that the offender "shall have his or her ears nailed to posts, and there to stand for an hour, and moreover to receive thirty-nine lashes on his or *her bare back*." (act of 1828, § 41.) In Mississippi, if a colored person is found to have given false testimony, he is "to have one ear nailed to the pillory, and there to stand for the space of one hour, and then the said ear to be cut off, and thereafter the other ear nailed in like manner and cut off at the expiration of one other hour; and, moreover, to receive thirty-nine lashes on his or *her bare back*, well laid on, at the public whipping-post, or such other punishment as the court shall think proper, not extending to life or limb," (act of 1822, June 15.) But every recognition of the oath of a slave on any occasion, and especially every punishment of a slave for perjury, testifies to his capacity as a witness. The barbarism of the punishment testifies also against slavery. But it is vain to say that a slave is incompetent as a witness, when in certain cases he is already accepted as such, and is visited with cruel punishment if he violates his oath.

The absurdity of this pretension is illustrated by a provision in the statutes of Kentucky, (Rev. Stat., cap. 74, art. 3, § 8; art. 9, § 2,) that a slave in the penitentiary is a competent witness against a white convict. Such was formerly the law of Virginia, and even now he is a competent witness for the white convict. Thus so long as a slave commits no crime, his oath is not received in court to affect a white person even with the smallest pecuniary liability; but let him be sent to the penitentiary as a convict for crime, and forthwith his capacity as a witness is enlarged, and on his testimony a white convict may be deprived of life! But obviously the commission of a crime which carries with it the doom of the penitentiary must impair rather than increase confidence in the veracity of the criminal. Such is the absurd inconsistency in the application of this rule.

Although the rule, in its origin, may be traced to slavery, of which it is an important ally, yet, from the considerations already presented, it seems to follow that it is founded on a reason broader than slavery, suggested, however, by slavery. According to the logic of these considerations, the disqualification of the slave as a witness against white persons is not founded on the fact that he is a slave, because the disqualification, except in Delaware and Louisiana, attaches also to free colored persons; nor is it founded on the want of that religious belief which is required in a sworn witness, nor on any actual disregard of his testimony under oath, because the slave in certain cases is sworn, and his testimony under oath is accepted in the administration of justice, and he is punished for perjury; but it is simply, in the last analysis, *an incapacity attached by law to persons of color*. Indeed, the obvious inference from a judgment of Judge O'Neale (2 De Bow, 274) is, that, in his opinion, it is not slavery, but color, which is the ground of exclusion. But the committee have already shown the pernicious consequences of such a proscription, and especially that the disfranchisement of one

race operates as a privilege to all white persons—not excepting, in most of the States, even white convicts, who are at liberty to do as they please, and commit any crime in the decalogue "unwhipt of justice," if nobody but a colored person is present. It can need no argument to establish the unreasonableness of a disqualification which, according to the confession of its partisans, attaches to the shading of the human skin, especially in view of the terrible injustice which is its natural consequence.

But in Delaware and Louisiana the disqualification rests on the fact of slavery. In many of the other States, the free colored persons are so few in number that the fact of slavery seems still to overshadow the whole race. Assuming, then, that the disqualification may be traced not merely to the shading of the skin, but to the fact of slavery, it is none the less to be rejected, not only as a part of slavery, but as essentially irrational and unjust.

The slave feels the sanction of an oath hardly less than many white persons of inferior condition. On grounds of reason, therefore, and independent of prejudice, the two classes at the outset would be entitled to an equal degree of confidence, modified, of course, or decreasing where there was a manifest interest or temptation to testify falsely. But the slave is exposed to such disturbing influence less than a white person. He can have no pecuniary interest, since he has no right of property. And, except where his master is a party or is otherwise interested, he must be alike without hope of gain or fear of punishment to make him swerve from the truth. Accordingly, in all cases where his master stands indifferent, the reason for excluding the slave is not so strong as for excluding white persons of inferior condition, since the slave may feel the sanction of an oath as much as they, while he is less exposed to any disturbing influence. Such certainly is the conclusion, justified by the facts, on this head.

The dependence of the slave upon his master must naturally subject him peculiarly to his influence, whether from hope of reward or fear of punishment, so that his testimony in favor of his master would always be viewed with suspicion. If, contrary to this active interest, the slave testifies *against* his master, his testimony would seem to be worthy of peculiar consideration. But even where he testifies *for* his master, there can be no more reason for excluding his testimony than for excluding that of a child for a father or a mother, or of excluding that of a father or a mother for a child. Unquestionably, in each of these cases, the bias is stronger than any that can exist on the part of a slave, as love is stronger than fear. Therefore, there is no valid reason why a slave should not be permitted to testify *for* or *against* his master. The same considerations which determine the value of other testimony will suffice with regard to him; and thus, in every respect, the rule of exclusion becomes irrational and eccentric.

But this rule, whether applicable to slave or free colored persons, is still more irrational and eccentric when it is considered that the testimony is submitted to the scrutiny of a jury of white persons under the watchful observation of a court of white persons likewise, and that it can have no effect whatever except through the assent of their judgment. The motive which actuates the slave, whatever it may be, whether revenge, or interest, or fear, must be open to discovery. It is, therefore, preposterous to argue that any white person, at any time or anywhere, especially in a slave State, can be prejudiced by colored testimony, or that he can be convicted by a white jury under the eye of a white court, unless that testimony is strictly worthy of belief. The rule of exclusion, except as an expression of tyranny and prejudice, is an insult to the understanding and even to common sense.

If this rule were only irrational and eccentric, it might be pardoned to immeasurable madness and handed over to the derision of mankind. But even its absurdity disappears in its appalling injustice. Two things are obvious to the most superficial observation: first, that under its influence the slave is left

absolutely without legal protection of any kind, the victim of lawless outrage; and secondly, that even crimes against white persons may escape unpunished; so that in these two important cases justice must fail. But this failure of justice becomes intolerable when it is considered that it is not from accident or temporary weakness, but that it is absolutely organized by law. Nor is it confined to slaves. It embraces in its ban free colored persons also, without regard to intelligence, property, or relations in life.

CONCLUSION.

Such is this proscription as it appears (1) in the various statutes of the slave States; (2) in the eccentricities of judicial decision; (3) in its consequences; (4) in the examples of history, and (5) in the grounds on which it is founded. Regarding it in either of these aspects it must be rejected. The statutes in which it is declared and the judicial eccentricities by which it is illustrated belong to the curiosities of an expiring barbarism. Its consequences shock the conscience of the world. The examples of history testify against it. The reason on which it is founded shows that it stands on nothing that is reasonable.

It is for Congress now to determine whether this proscription shall continue to be maintained in the courts of the United States, or, in other words, if a local rule—barbarous, irrational, and unjust—born of slavery—shall be allowed to exist any longer under the national sanction.

APPENDIX.

Letter of Hon. John Appleton, chief justice of Maine, to Hon. Charles Sumner.

BANGOR, *January* 24, 1864.

MY DEAR SIR: During the second session of the thirty-seventh Congress, when the bill "in relation to the competency of witnesses" was before the Senate, I perceive that an amendment you proposed, "that there shall be no exclusion of any witness on account of color," was rejected after debate. At the present session, a bill to effect the same object has been offered by the Hon. Mr. Lovejoy, of Illinois. As this question may again come up for discussion, and as it appertains to the domain of jurisprudence rather than of politics, I propose to call your attention to the present condition of the law on the subject, and to show the imperative need of a radical change therein, so far as relates to the administration of the law in the courts of the United States.

The due enforcement of the law in no slight degree depends upon its rules in reference to the admission or rejection of testimony. The law to be enforced—the substantive part—that which commands or prohibits, may be the perfection of legislative wisdom; yet, if by reason of exclusionary rules, the proof necessary for the establishment of *existing facts* is not forthcoming, the law however wise, becomes powerless, and to the extent thus rendered powerless, might as well not be.

By the act of July 16, 1862, chap. 189, "it is provided that the *laws of the State in which the court shall be held* shall be the rule of decision as to the competency of witnesses in the courts of the United States in trials at common law, in equity, and in admiralty." That Congress can, constitutionally, fix and determine the rules of evidence by which the courts of the United States shall be governed in all cases within their jurisdiction, was assumed in the judiciary act of 1789, and is assumed in and by the passage of the act just referred to.

But the laws of the several States are at variance as to the admissibility of witnesses. In some there are exclusions enormous in extent and disastrous in result. I refer to the exclusion of negroes and those of mixed descent, whether bond or free, and to Indians—by the former of which, in some of the States, the majority of the whole population are disabled from testifying *for* or *against* the dominant class; by the latter of which, the original occupants of the soil are denied by the higher civilization, which has wrested from them their lands, even the capacity to be heard as witnesses in the courts of those who now occupy and enjoy them.

I shall enter into no discussions as to the morality of slavery. Its rightfulness; its patriarchal antiquity; its Christian graces, and its moral beauties may be admitted; it may be conceded to be what many learned divines claim it is—an institution alike beneficial to master and to slave, sanctioned and approved by the laws of God and of man—the grandest and finest realization on earth of the golden rule, "that whatsoever ye would that men should do to you, do ye even so to them;" *or* it may be what the illustrious founder of Methodism so pithily and tersely described it—the sum of all villanies. In either view, for the institution is one in regard to the character of which theologians differ where moralists agree, the need of the testimony excluded is none the less apparent, and its reception none the less important.

In relation to all matters over which Congress has jurisdiction, or which are within the cognizance of the courts of the United States, we must be regarded as one nation. The acts of Congress extend over the whole people. They

should be everywhere the same; they should be uniform in their operation. The idea of opposing and conflicting legislation for the several States no one would entertain for a moment. If, instead of a general law embracing all the States, there were several and distinct statutes on the same subject-matter—as one tariff for South Carolina and another and distinct tariff for Massachusetts, to say nothing of its unconstitutionality—such legislation would never be submitted to. We should cease to be one people.

But if the rules of evidence, by and through which alone the facts to which the law is to be applied are ascertained, are diverse and conflicting in different States, it is manifest that in fact the laws to be enforced will be thus diverse and conflicting in their operation, because by reason of such admissions of witnesses in one State and the exclusions of the same in another, different judicial results must necessarily ensue. The statute may be the same in each State, but it is only so in name. A murder is committed on the high seas by a white man. The only witnesses to its commission are black men. The murderer, if tried in South Carolina, is acquitted—black men not being permitted there to testify. If tried in Massachusetts, with the same proof which existed and was attainable in South Carolina, but the reception of which was prohibited by its laws, he would be convicted. Practically, the law of the United States, as thus administered in accordance with the local law of evidence, prohibits and punishes murder *only* when committed in the presence of white men in certain States of the Union, and in the rest when committed in the presence of *any* man or men without respect to their color. Crime is punished or not according to the statute law of the State in which the trial is had, and the legislation of Congress ceases to be uniform over the whole nation.

Uniformity in the administration of the law is unattainable if the rules of evidence, by and through which it is administered, are conflicting and contradictory. It would be deemed absurd enough if a State were to establish different rules as to the admission or rejection of witnesses in its several towns and counties. If a bill were before Congress by which interested witnesses were to be admitted to testify in Maine, and were excluded in Massachusetts; by which the color of the witness should suffice for his rejection in Virginia, but should not in Maryland; by which all copper-colored men were declared to be so untrustworthy in Mississippi that they should not even be heard, while in Alabama no objection to their admission was allowed, and so on, with varying rules in the different States, probably few members would be found to give it support. But if these different rules exist in the several States, and receive the sanction of congressional adoption, wherein consists the difference? There can be no uniform administration of justice. If the rules of evidence vary; if the witnesses by whom the facts can be proved are received in one State and rejected in another, it is obvious, that with the same facts existing, provable by the same witnesses, before the same judge, under the same law, the results will vary as the needed and indispensable proof is admitted or excluded. Thus, while the statutes of the United States extend in terms over its whole territory, their successful enforcement will depend upon the latitude and longitude of the place where the attempt is made.

Were Congress to pass a general law defining the acts which shall be deemed offences and prescribing the punishment consequent upon their commission, and should further enact that when committed in the presence of black men or Indians they should not be punishable in one half of the States, and that in the other half, when so committed, they should be punished, the advocates of such legislation would not, it is to be hoped, be very numerous. But passing general statutes creating offences, and then enacting another general law adopting the rules of evidence of the several States by which blacks and Indians are excluded, and at the same time those of other States, where they are admitted, is doing this and no more.

The consequence of all this is, that while by one and the same statute a general law is established over the whole Union, by another and equally general law adopting the discordant and conflicting rules of evidence of the different States, the first is in part repealed, and its uniformity of action and effect is prevented. The same law is to be administered, but with contrarient and opposite rules of evidence, and of necessity with different and opposite judgments. Now, it matters little whether there be different statutes for the different States prescribing different laws, or there be one and the same statute for all, with another statute commanding the judges in administering the law to adopt different and conflicting rules in the ascertainment of facts in the different localities in which it may be their duty to administer it. Uniformity in legislation is an axiomatic principle. But here disconformity is required and established by statute.

Of the various and conflicting rules of evidence thus adopted by Congress, some are good and some are bad, some are wise and some are unwise. Thus, in some States, interested witnesses are excluded, in others not. In some, men are prohibited from testifying because their bodies are black or copper-colored. In others, these formidable proofs of testimonial untrustworthiness are disregarded, and black and copper-colored men are examined as witnesses. Of rules thus opposed, both cannot be right, both cannot be equally wise and equally conducive to the ends of justice.

In this conflict as to the rules of evidence in the several States, it is not the duty of statesmen to adopt all, good or bad, and with an impartial indifference to their goodness or badness, but to select the good, those which are conducive to the great end of justice, correct decision, and to reject those which, in their tendency, lead to misdecision. Unless this be done, unless uniform rules of evidence are established throughout the whole Union in the courts of the United States, the uniform action of any statute passed by Congress is delusive and unreal.

The expediency and necessity of uniformity in legislation being seen, the inquiry naturally arises, Which of two conflicting and opposite rules of evidence is to be preferred, regard being had to their conduciveness to correct decision. In other words, is the admission of negroes and Indians as witnesses favorable or adverse to the judicial ascertainment of the truth? They have the form of our common humanity: they have all the organs of sense: they can perceive, and perceiving, can make known their perceptions to others; that is, they have all the essential requisites of witnesses. Why not hear them?

The sources of evidence are everywhere the same. Shall those sources be rendered available for the purposes of justice? The gravity and importance of the question will be more fully appreciated when it is remembered that the inquiry relates not to the exclusion of a solitary witness—as the exceptional atheist or the occasional convict—but that it involves that of millions; the rejection of distinct races of men; the aboriginal inhabitants of two continents, and their descendants, as destitute of testimonial veracity. As though there were any races—as though the Almighty had so failed and bungled in the great work of creation that there was any race of men of whom falsehood was the rule, and truth the exception.

That judicial action requires, or should require, for its basis, proof; that this should be sought for from all available sources; that existing, no matter where, it should be rendered forthcoming for the purposes of justice, would seem to be propositions so self-evident as to require neither argument nor illustration. That the sources from which evidence would be sought should vary in relative trustworthiness was to be expected, for witnesses in a cause cannot be selected in advance. When the burglar will enter the dwelling; when the assassin will stab; when the knave will defraud; when the dishonest will evade the obligations of his contract, can neither be foreseen nor foreknown; for if foreseen or foreknown, the entry of the burglar, the stab of the assassin, the frauds of the

knave, would have been guarded against and prevented; the violated contract would not have been made. Proof, therefore, must necessarily be had from sources corresponding to the act or contract to be proved; from the parties to the act or contract; from their accomplices and associates; their friends and relatives; from any and all who may have had knowledge of the transactions to be investigated.

No rule can be established in advance by which the degree of credit to which a witness should be entitled can be predetermined. The same law of nature by which the size, the strength, the complexion, is seen to vary, will equally exist in reference to clearness of perception, strength of recollection, and integrity of narration. Whether the perception of a witness is acute, his memory good, his integrity unimpeachable, can only be known after and consequent upon examination. Common sense requires a hearing in each particular case before deciding upon the greater or less degree of credence to be given to the witness. Of individuals, or of classes, there are none of whom falsehood can certainly be predicated in any particular instance. Exclusion, because of anticipated falsehood, is decision without and before hearing; decision adverse to the integrity of the witness. The law in one phase of its action, when the criminal is on trial, presumes his innocence; when a witness is to be called, in all its exclusions, the presumption is of guilt—anticipated perjury—to prevent which the witness is excluded; crime on the part of the witness, on its own part incompetency utter and irremediable, else there would be neither fear nor danger in receiving proof, against the truth of which the court excluding seems to be so fully and entirely warned.

However difficult it may be, after the full benefit of examination and cross-examination, after a careful comparison of one witness with another, to award to each the precise degree of credence which his testimony may merit, it is still more difficult to decide this without and before such hearing and comparison. Caution necessary in all cases may be more particularly required, therefore, when there is danger of undue credence. But caution and exclusion are entirely different. Caution places the judge on his guard against sinister bias, gives him all possible material for correct decision, but demands discretion and judgment in the use of the means furnished. Exclusion withholds and denies, in whole or in part, the materials indispensable for just decision. If the evidence excluded be true, no conceivable reason can exist for its rejection. Whether it will be true or false cannot be foreknown. Neither legislative nor judicial assumption can claim infallibility, yet excluding, such is the assumption. Misdecision, the excluded evidence being material, true, and unattainable from any other source, is seen to be inevitable. If the evidence be not true, that misdecision would ensue from its reception is by no means certain. If false, its very falsity, made manifest from other sources, would be an article of circumstantial evidence of no ordinary probative force in inducing correct decision. Presumed imbecility on the part of the judge of fact; presumed guilt, or rather guilt presumed on the part of the witness, if an opportunity to testify should occur; such the logic of exclusion. How can legislators foreknow that future judges, whose capacity and whose person are alike unknown, will be deceived by unknown witnesses of whose integrity and existence they are equally ignorant. But exclusion presupposes a judgment of which such exclusion is the consequence—a judgment without knowledge, or the possibility of knowledge of the veracity or want of veracity of those excluded, which determines the future perjury of the excluded class as preponderantly probable, and the future inability of all judges to justly decide on their testimony as reasonably certain.

The exclusion of testimony from whatsoever source is presumably wrong. Exclude evidence material and unattainable from any other source for whatsoever reason, plausible or otherwise; exclude evidence, and to the extent of and in proportion to the importance of the evidence excluded, the judge of fact

is deprived of the means of forming a correct judgment upon the facts. Exclude for any reason all evidence, and it remains only to determine the rights of litigants by lot.

He who would exclude material evidence, attainable from any source, is bound to give satisfactory reasons for such exclusion

The reason assigned for excluding negroes and Indians as witnesses is "the degraded state in which they are placed by the laws of the State." They will steal and lie. Finding their own labor appropriated for the benefit of others, and looking at the subject from a somewhat different stand-point from that of their masters, that slaves, whenever they have, or deem they have, a safe opportunity, should, without fully appreciating the heinousness of their offence, or the benefits conferred by mastership over them, make reprisals of their own earnings, may well be deemed a natural result of "the degraded state in which they are placed by the laws of the State." So it would be strange if they had a chivalric regard for truth or were models of veracity. The plantation is hardly a better school for morals than for manners. The slave will probably be more addicted to falsehood than the freeman. It is the result of his condition. Falsehood is perhaps the only weapon, whether of offence or defence, most readily available, and the use of which is attended with the least danger.

But whether there will be truth or falsehood in any case, and from any individual, will depend upon the motives upon him, when and where he may be testifying, and upon their strength. The black as the white man, the bond equally with the free, are influenced by motives, and their testimony will be the resultant of those motives and their strength. There are no motives impelling one race to truth or to falsehood, which do not operate upon the other. The same motives at different times and under different circumstances may vary in their strength and intensity with different individuals or with the same individual. So, too, the tendency of the same motive may at one time be in the direction of falsehood, at another in that of veracity. Neither the motives nor their strength nor their direction depend upon the color of the skin or the woolliness of the hair. So far as the motives to the action of which an individual stands exposed tend in the direction of truth, the testimony delivered under their influence may be expected to be true. Wherever their tendency is adverse to the truth, falsehood may be anticipated. Motion is never in a direction contrary to that of the force impelling. The laws of matter are no more constant and unvarying than those of the mind. In no instance will the testimony, whether of the black, the copper-colored, or the white man, be adverse to the balance of motives affecting his mind and determining his conduct.

All men, the most vicious, the most false, the most indifferent to the obligations of integrity, utter the truth rather than falsehood. Truth is the language of nature; falsehood the rare and occasional exception. The greatest liar, no matter how depraved he may be, usually speaks the truth. The reason is obvious. Invention is the work of labor. To narrate facts in the order of their occurrence, to tell what one has seen or heard, is in accordance with the very laws of our being. To avoid doing this is a work of difficulty. Falsely to add to what has happened, carefully to insert a dexterous lie, requires ingenuity greater or less, according to the greater or less skill with which the lie is dovetailed among the surrounding truths. No matter how cunning the artifice, the web cannot be so woven that the stained and colored thread shall not be perceived. Love of ease, fear of labor, the physical sanction, are ever co-operating in favor of truth. Any motive, however slight and infinitesimal it is, may be sufficient to induce action in a right direction, unless overborne by other and superior motives in a sinister direction. By a sort of impulse, by the very course of nature, the usual tendency of speech is in the line of truth. There lives not, there never lived, there never will live the man of whose statements truth may not be predicated as the rule, and falsehood the exception. Society

could not subsist were it otherwise. Even in plantation life, the same rule must apply. In the intercourse of slaves with each other, with their masters, with all, truth must be the rule, falsehood exceptional. As in the ordinary intercourse of life, so it would be with judicially delivered statements. Indeed, his testimony, when uttered under the sanctions of an oath, and under the penalties of the law, would be more likely to be true, however rude and uncultivated the witness, unless those sanctions and penalties are to be regarded as in their tendency adverse to the truth.

In the great mass of cases truth might be expected. Intentional falsehood could never be anticipated unless when the witness is exposed to the influence of some motive acting with overwhelming force in a sinister direction. But no motive tending to falsehood, and every motive tending to truth, or the balance of motives having such tendency, truth would necessarily be the result, for men, however black, copper-colored or white, never act without motive, nor against motives, nor the balance of motives. There is no greater probability of any or all motives acting in a sinister direction upon one race than another, for are we not all children of our common father? There may be errors, but they will be those of deficient perception, defective memory, or inadequate expression—sources of error arising not from the color of the skin or the crisp of the hair.

The truth being the general rule, if the testimony is received, is material, and true, and being true is believed, justice is done; when, without its reception, injustice must have inevitably occurred.

But with the black, copper-colored, bond or free, as with the white man, the motives operating upon the witness may tend in a sinister direction and the testimony may be false. This, however, is no more peculiar to one race than to another. May not the same be said of the white man? But what does the judge in case of the white witness? He is exposed to the same danger. He cannot foreknow his truth. He may therefore be deceived. Does he then decline to hear him? Not he. Hearing, he weighs, compares and decides. Falsehood by its very nature is ever a source of danger to the person uttering it. Inconsistent with every true fact, inconsistent with every true witness, it is by its very nature exposed to detection and liable to refutation from any and every quarter. Of the statements of any witness part may be true and part false. The truth ever endangers the lie.

In the case of white witnesses, the judge relies upon the efficacy of cross-examination. Is that any the less efficacious with the slave than with his master? Is the intellect of the black man so acute, that he can baffle the sagacity of counsel? Are his perceptions so quick, that he can elude the vigilant watchfulness of the experienced judge?

But suppose falsehood the exceptional case by the very constitution of our nature, still the *danger of deception is not as the danger of falsehood*. If the testimony, being false, is not believed, injustice is not done. But too implicit credence is not a danger to be feared on the part of those who would exclude. Is the intellect of the judge darkened by hearing black witnesses? Is the judge, distrustful and diffident, competent to weigh white testimony and to accord to it the just measure of its trustworthiness, and does his capacity fail him when the color of the witness changes?

Where the witnesses are of either of the *excluded races, and their testimony*, being true, material, and necessary, is not *received*, injustice is inevitable.

The exclusion cannot be on account of the falsehood of the excluded witness, for in no particular instance can it be known *in advance*, by the legislation which excludes, what the witness would say.

The judge will hardly rest the exclusion of this testimony upon his incapacity to give it its due weight, he being capable to weigh that of the dominant race.

Neither is the exclusion on the ground of the servile condition of the excluded testimony, for when the black man or Indian is on trial, whether bond or free,

the black witness or the Indian, whether bond or free, is permitted to give testimony for or against those of his own race. *Such the general rule.*

Now it may be fairly assumed that the dominant and law-making race, when enacting laws for and imposing penalties upon the servile class or upon a degraded caste, do not desire that innocence should be punished, or that guilt should escape. When a black man is tried and black witnesses are examined, the judge of fact, by whatsoever name called, hears the evidence, and decides in whole or in part upon it. Is it deceptious? *If so, why receive it?* Is he incompetent to determine its just force and effect? If so, why make the attempt? Or does this species of evidence afford a satisfactory basis for a decision? If it affords no true basis for decision—if it is productive of misdecision—if such is the teaching of experience, why not repeal the law? Why receive testimony intrinsically untrustworthy against anybody? Is the law-giver or the judge indifferent to injustice? Is it immaterial to him whether it be done to the black man or not? To him justice is none the less desirable than if his complexion were lighter. Nor is his condition so desirable that he can any better dispense with justice than *those of the dominant class.*

Assuredly the master, purporting to administer justice, will not admit that he is indifferent whether it be administered or not; still less will he deny that he administers it. Judicially determining controversies between black men—criminal prosecutions against slaves, he had admitted witnesses of the same race, and of the servile class. He has found their reception, on the whole, favorable, or adverse to the ends of justice. If adverse, and such testimony continues to be received, then does the dominant and *law-giving race stand* self-convicted of the deliberate and wanton infliction of the deep wrong of injustice upon the servient race. If tending to misdecision, and that fact is known, as it must be known, no language of indignant *reprobation and scorn can be undeserved.*

If, on the other hand, the testimony is *conducive to correct* decision, when blacks are parties, and its continued admission is proof of the fact, what reason can be given why the same testimony should not be received between free men of the different races, and in prosecutions against slaves? The experiment of black witnesses has been tried. The evidence trustworthy as between blacks, would it at once become deceptious if admitted in suits where the parties were of the black and white races?

The importance, the necessity of the testimony of black men and Indians, bond or free, in controversies between those of their respective races, is recognized. None the less important and necessary is the admission of the same evidence in suits between those of the master class and those of a degraded caste. Is it any the less desirable that the white man should do justice to the negro or the Indian, than that the negro or the Indian should do justice to the white, or than that the black and copper-colored men should do justice to each other? If the black man or the Indian is to have his rights as against the white man, is he not entitled to the same witnesses against the white man which the latter has against the former?

Is justice to be administered according to color? At Athens, in ages past, justice was symbolled as blind, with bandaged eyes, that she might not know the parties. No such symbolic impartiality can be ascribed to American justice. The bandage is removed that she may discern the color of litigants and witnesses, for she metes out her judgments, not upon *inflexible principles of right,* but according to the varying complexions of her suitors. Between black litigants she receives all men as witnesses. When the parties are black and white, or copper-colored and white, she receives only white witnesses, and excludes the black or copper-colored.

The law-making class receive testimony in suits between parties of the black race, which they reject when they are of that and the white race: the color the cause of the difference. Was the testimony rightfully received in the one

case? Why not in the other? There may have been no other attainable proof in the former: equally so in the latter. *Penuria testium*, a civil law excuse for admitting testimony, the reception of which needs no apology, applies alike in each case, provided correct decision be the object sought to be obtained.

In controversies of this character it can hardly happen that there shall not be percipient witnesses of the facts in dispute belonging to each race. Those of one are received, while those of the other are rejected. The deliberate exclusion of testimony is the deliberate self-deprivation of the means of correct decision. With but half of a cause, with but fragments of the truth, what hope can there be that justice will be done?

But here, too, it may be urged, the testimony may be false—a reason applicable to all testimony; valid for disbelief after hearing, never for rejection before hearing; for whether true or false, could never be foreknown of any witness before hearing. Excluding is judging without hearing. Of what conceivable witness, of what race, can it be predicated with absolute certainty that the testimony *will be true or will be false?* The contingent possibility of falsehood is no reason for the exclusion of probable truth.

But the testimony being false, the judge may be deceived. What likelihood of deception and *consequent misdecision* on his part adverse to the law-making and testimony-excluding class? His sympathies are adverse—so adverse to the admission of the testimony that he would not even hear. Hearing, will he be unduly credulous of witnesses, of the untrustworthiness of whom he was beforehand so fully satisfied that he insisted upon their peremptory exclusion? If hearing, he should believe, what stronger, what more assured proof of its truthfulness than that, forgetting the prejudices of color and of caste, he has given reluctant credence to testimony he would not willingly have heard? By so doing, justice is done to the black. Is not that what the judge wishes to do—insists he is doing—seeks all available means of doing; but which the law denies him the opportunity of doing, whenever the requisite proof is withheld?

If disbelieved, still the wisdom of the admission is none the less apparent. It is not merely desirable that justice be done, but that it seem to be done. When all the material needed for correct decision is before the court, it may, nevertheless, err; but possible error with the means of correct decision, affords no reason for withholding the means essential to that end. If the certainty of correct decision is not greater with than without proof, better resort to chance, to the lot, and abide the issue.

Whether justice is to be administered to the rich man or the poor, to the native-born or the foreigner, to the slave or the freeman, to the white, the copper-colored, or the black man, the rules of evidence best fitted to elicit truth from every source, from lips willing and unwilling, should be adopted. The object, in all cases, the same—the ascertainment of the truth. The rules for the black man cannot vary from those for the white—for the bond from those for the free. The same end being alike sought, the means for its attainment cannot be variant.

It was decided in Com. *vs.* Oldham, 1 Dana, 466, and in William *vs.* Blincoe, 1 Lit., 171, that a free man of color might, by his oath, require a white man to keep the peace. "A free man of color," remarks Robertson, C. J., "may sue and be sued. When he is plaintiff he may swear for the continuance of the cause. He may make an affidavit requiring bail. They are incident to his freedom, and *without them he would be virtually disfranchised.* And when he swears to facts against a white man to compel to keep the peace, he is not a 'witness,'* but a party swearing to what any other party may." The black man is allowed to swear the peace against his white neighbor and compel him

* A free person of color is not a witness in the courts of South Carolina, *even when the parties are of his class.*—Groning *vs.* Devana, 2 Bailey, 192.

to give bonds to keep the peace. But is he not a witness then? Does he not testify? Is not an oath administered; and, being administered, does not the magistrate base official action upon his testimony? Does he not so far believe the witness as to require the white man to give security to keep the peace? A witness thus far, because, if not to this extent, "he would be virtually disfranchised." Suppose the white man breaks the peace; is the black then received to testify? Not at all. Is he not then virtually disfranchised, if, on a trial for a breach of the peace for an assault committed, his testimony is rejected? If allowed to testify for the purpose of preventing a wrong, why should he be prohibited from testifying when the wrong is done? What is the security good for if, when the bond is broken, he cannot be a witness in a suit for its enforcement?

Indeed, as the law now is in all the slave and in many of the free States, a white man may commit any and all conceivable outrages upon the persons and property of the negro and Indian, in the presence of any number of either of those races, bond or free—he may perpetrate any fraud upon, or violate any contract with them—and all this with entire impunity, unless they can establish the facts required for redress by the testimony of white witnesses. Unlimited license to commit any crime upon, or to do any wrong to, the black and copper-colored races, is thus awarded to the white man, unless those of his own complexion are present. Shall Congress sanction the enormities resulting from such laws, by establishing them as those by and under which its own statutes are to be enforced? Well might Montesquieu say, "it is impossible for us to suppose these creatures to be men; because by allowing them to be men, a suspicion would follow that we ourselves are not Christians."

In cases, civil and criminal, in which the dominant race are the litigants, the necessity of this testimony is none the less than in those where the parties are of different races, yet the exclusion is made peremptory "when the parties are free white *Christians*." *

It seems to have been settled with great deliberation that a master may shoot his slave, male or female, by way of correction, and that he is not liable therefor to indictment. ‡ This general right of shooting is recognized as one of the necessary incidents of ownership, and its exercise is limited to the owner. If a white man, therefore, having no right of property, should shoot a slave, he would be held liable to the owner for the injury done his property. ‡ Suppose the slave only wounded and the only witness, or, if killed, black men only witness his murder; is property not to receive protection? Is not the owner entitled

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* In Rusk *vs.* Sawerwine, 3 How. and Johns., 97, Nicholson, C. J., held Minta was an incompetent witness; the plaintiff and defendant being free white *Christian persons*. The plaintiff appealed, and the case was argued before Chase, C. J., Buchanan, Gaut, and Earl, justices, when the judgment was affirmed.

‡ In State *vs.* Mann, 2 Dev., 263, the defendant was indicted for an assault and battery upon Lydia, the slave of one Elizabeth Jones. On the trial, it appeared that the defendant had hired the slave for a year; that during the term the slave had committed some small offence, for which the defendant undertook to chastise her; that while in the act of so doing, the slave ran off: whereupon the defendant called upon her to stop, which being refused, *he shot at and wounded her*. The judge in the court below charged the jury, that if they believed the punishment inflicted by the defendant was cruel and unwarrantable, and disproportionate to the offence committed by the slave, that in law the defendant was guilty, as he had only a special property in the slave. A verdict was returned for the State, and the defendant appealed. The judgment below was reversed; and judgment was entered for the defendant.

‡ Trespass for killing the plaintiff's slave. It appeared the slave was stealing potatoes from a bank near defendant's house. The defendant fired upon him with a gun loaded with buck and killed him. The jury found a verdict for plaintiff for one dollar.

Nott, J., held there must be a new trial; that if the jury were of opinion the slave was of bad character, some deduction from the usual price must be made; but the plaintiff was certainly *entitled to his actual damage for killing his slave*.—(Richardson *vs.* Duke, 4 McCord, 156; Wallis *vs.* Frazier, 2 N. and McCord, 516.)

to his actual damage? Without this evidence anybody may shoot slaves for amusement or revenge, with great detriment to the rights of property, provided it be done out of sight of white men.

So, too, in criminal cases, the black man may be the only witness by whom the innocence of the accused can be established. Innocent, and the witness black, if the testimony is rejected, the innocent white man must suffer the penalty of guilt. The accused guilty, the testimony of black men the only existing proof, its rejection necessitates an acquittal, and guilt escapes punishment.

The need of this testimony becomes still more apparent if it be the design of government to enforce its own laws. If half the population of a State capable of being witnesses were to be excluded on account of size or sex, how manifest it is that with such exclusions the attempt to do justice would be almost hopeless. Color affords no more logical reason for exclusion than size or sex.

In controversies between those of the white race, it is not a matter of privilege to the black man, who has no interest in the controversy, that he be permitted to testify, any more than it would be to the white man under like circumstances. If being a material and needed witness, either is excluded, it is the cause of justice that is endangered. Justice is equally denied when suitors are refused access to her temple, as, when having access, they are prohibited the use of the testimony by which alone right can be established.

But why not hear this testimony in suits between, or in prosecutions against, white persons? It is none the less needed because the parties are white. Is the judge of fact, howsoever called—chancellor, judge, or juryman—any the less able to weigh the evidence of black persons because the color of the parties litigant differs from that of the excluded race? Self-satisfied with his ability to judge of the trustworthiness of black witnesses, when the parties are of the same color, does his judicial ability vanish upon a change of color on the part of the suitors? Receiving this testimony with parties of the black or Indian races, and weighing or assuming to weigh it, cannot he do the same thing when white men are litigating before him? The judge competent for his position, is he so afraid of the seductive influence of black witnesses that he will not trust himself to hear them? Is the black man more untrustworthy when parties are white than when black? Is he more deceptious? Does the ability of the judge vary with the varying races and conditions of those to whom he is meting out justice? If not, then he can weigh this testimony as well when one race is litigating as another, and it has been seen he has no scruple to use it where the parties and the witnesses are of the same color. The real danger is not of undue credence, but that, hearing, the judge will not give it the weight to which it is justly entitled. But that objection is not open to the advocate of exclusion, who protests that it is so utterly unreliable that he is unwilling even to hear it.

Exclusion, let it be remembered, depends not on the *status* of the witness, for free blacks and slaves are alike admissible for or against those of their own race, whether bond or free. Where the rights of the dominant race are involved, the black, though free, is excluded. The admissibility of witnesses is made to depend not upon their condition, but upon their color alone.

No other instance can be found in the legislation of any nation, civilized, semi-civilized, or barbarous, in which free men have been rejected as witnesses because of their color. By the civil law slaves were not admitted to testify. Such, too, is the Mahometan law on this subject. But the exclusion is limited to the slave. When free, he is at once a competent witness, irrespective of his color or his descent.*

* By our treaty with Mexico, by which we obtained California, we guaranteed that citizens of the ceding republic should have equal rights with those of the republic to which the cession was made. Yet the moment California became ours, the negro and the Indian, though citizens of the ceding republic, and by their laws witnesses, were at once deprived of testimonial capacity.

The negro and the Indian are excluded on account of color. After successive intermixtures of their races with the white, varying in the different States, their descendants are received. The white race being regarded as the type of truth, the more it is intermingled with the degraded castes, the more trustworthy the witness—the mulatto than the negro, the quadroon than the mulatto—till, at length, after sufficiently numerous acts of illicit intercourse, continued through successive generations, testimonial trustworthiness is restored.

The exclusion of evidence is the unmistakable proof of deficient civilization. The barbarian refuses to have witnesses, and resorts to ordeals by fire and by water. Unwilling to trust his own judgment, he is willing to trust to chance. He prefers exclusion to investigation. Rather than weigh testimony he would reject it. He excludes the Mahometan, and is in return excluded by him, and for the self-same reason that the belief of the judge excluding differs from that of the witness excluded. Of all exclusions, the one most libellous upon humanity, most blasphemous to Deity, is that by which whole races of men are prohibited from testifying on account of their color, as if mendacity was the result of their having a greater amount of pigment cells, and a greater number of cutaneous glands; as if the Almighty had so failed as to have created whole races of men so untrustworthy that it would be unsafe even to hear their testimony. But barbarous methods for the investigation of truth recede before the advance of civilization. The ordeal has passed away. The judicial lot has ceased. Interested witnesses are received. The Christian hears the Mahometan, and whether the Mahometan reciprocates depends upon the distance he has receded from barbarism. Testimony is judged by weight, not by count—after, and not before and without hearing. I trust the time will soon come when it will cease to be a reproach to this age and nation that whole races of men are prohibited from testifying, not from any fault of theirs, but because God in his wisdom has seen fit to impress upon their form a browner or a blacker skin than upon the bodies of the race by whose legislation they are excluded.

I am, very truly, yours, &c.,

JOHN APPLETON.

Hon. CHARLES SUMNER,
Senate of the United States.